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and 82-398

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.* and CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION and UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.* and NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AUTOMOBILE OWNERS ACTION COUNCIL AND EUGENE J. MEYUNG

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QUESTION PRESENTED

Whether in light of all the facts and circumstances it was arbitrary and capricious and contrary to law for the National Highway Traffic Safety Administration to decide that a particular type of passive seat belt proposed to be used by certain manufacturers would be too ineffective to warrant its use and that accordingly the entire passive restraint safety standard, covering air bags and other types of seat belts of proven effectiveness, should be rescinded?

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BRIEF FOR RESPONDENTS NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AUTOMOBILE OWNERS ACTION COUNCIL AND EUGENE J. MEYUNG

STATEMENT

This case concerns the rescission of a safety regulation that would have required the installation of automatic crash protection devices in newly manufactured automobiles beginning on September 1, 1982. The long history of automatic crash protec-

tion before the agency, the Congress and the courts is set forth in the court of appeals opinion and the petitioners' briefs. Any such history, however, assumes a familiarity with certain basic facts that may not be obvious from the complex record. NAII[1] will limit this statement to those facts.[2]

1. The enactment of the National Traffic and Motor Vehicle Safety Act, *as amended*, 15 U.S.C. §§ 1381, 1391-92, 1394-1403, 1405-26, 1431 (1976 & Supp. V, 1981) [hereinafter cited as Safety Act] in 1966 was meant to be the single most important step ever taken by the federal government to protect the public health and safety. Technological developments are often a mixed blessing, but never so much as with the motor vehicle, a device that gave Americans an unprecedented freedom to travel but that had emerged by 1929 as the leading cause of accidental deaths and injuries in the United States.[3]

The Safety Act has yet to fulfill its promise. Certainly, some progress has been made. Motor vehicle death rates, in

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[1] "NAII" refers, collectively, to respondents National Association of Independent Insurers, Automobile Owners Action Council and Eugene J. Meyung. The member companies of the Association are identified in the appendix to NAII's brief in opposition to the petitions for certiorari. Other parties to this matter are identified as follows: petitioners United States Department of Transportation *et al.* (hereinafter "DOT"); petitioners Motor Vehicle Manufacturers Association of the United States, Inc. *et al.* (hereinafter "MVMA"); petitioners Consumer Alert *et al.* (hereinafter "Consumer Alert"); and respondents State Farm Mutual Automobile Insurance Co. *et al.* (hereinafter "State Farm"). The National Highway Traffic Safety Administration (hereinafter "NHTSA") was the agency below.

[2] Citations to the record will, where applicable, follow the format used in the DOT Brief: material in the Joint Appendix in the court of appeals will be cited as "C.A. App. _____"; and material in the appendix to the petition for a writ of certiorari filed in No. 82-354 will be cited as "Pet. App. _____" Material in the appendix to this Brief will be cited as "App. _____."

[3] *See National Safety Council, Accident Facts: 1982 Edition* 13 (1982) [hereinafter cited as *Accident Facts*].

comparison to number of motor vehicles, vehicle miles driven and total population, have decreased since 1966, but it is difficult to disaggregate the beneficial impact of the Safety Act from other, unrelated developments such as improved highways and the national 55 mph speed limit.[4] Moreover, there has been little progress in absolute terms. In 1966, 53,000 Americans died in motor vehicle accidents; in 1980 the figure was 52,600 deaths.[5] NHTSA estimates that these numbers will be even higher in future years because of the growing number of small cars on the road, with an additional 7,000 passenger car occupant deaths yearly by 1990. C.A. App. 263.

This impersonal calculus cannot begin to describe the magnitude of the human tragedy. For example, the chances are one in one hundred that a fifteen year old boy will die in an automobile accident before his twenty-fifth birthday, a death rate twenty times higher than that produced by the polio epidemic at its worst.[6] For every front seat occupant killed in a motor vehicle accident, there are over fifteen serious injuries. C.A. App. 73.

2. The primary failure of the Safety Act has been in the area of second collisions. The "second collision" is the collision between the vehicle occupant and the interior of the vehicle, and it is the major cause of motor vehicle accident deaths and injuries.[7] There are two ways to address this problem. The first is to reduce the severity of second collisions that otherwise occur, an approach that NHTSA followed by mandating interior design changes such as padded surfaces (Standard 201), head restraints (Standard 202) and collapsible steering columns (Standard 203). But the second and by far the most

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[4] *See Office of Technology Assessment, U.S. Congress, Technology and Handicapped People, Background Paper #1: Mandatory Passive Restraint Systems In Automobiles: Issues and Evidence,* 8-9 (September, 1982) [hereinafter cited as *OTA Background Paper*].

[5] *Accident Facts,* at 59.

[6] *OTA Background Paper,* at 7.

[7] In 1980, 25,200 front seat passenger car occupants died in accidents. C.A. App. 60. Nearly all died from hitting the interior of the car or from ejection onto the pavement—the type of occurrences seat belts are designed to prevent.

significant approach is to reduce the frequency of second collisions by holding the passenger in place when an accident occurs, or, as the Sixth Circuit once succinctly put it, "to assure that when the car stops dead, the passengers don't." *Chrysler Corporation v. Department of Transportation*, 472 F.2d 659, 663 (6th Cir. 1972).

The manual seat belt was the first method chosen to provide such protection, but it took only a few years of experience to demonstrate its inherent flaw—by requiring an affirmative action of the passenger to be effective, it would never be widely used. Over the years, usage rates for manual belts have declined to the point where they presently provide crash protection for only 11% of automobile occupants. For this reason, there has been a consensus of expert opinion for over a decade that the only way to address effectively the second collision problem is through automatic or "passive" devices, devices that require, in the words of Standard 208, "no action by vehicle occupants" to be effective. Two types of automatic crash protection devices have come to the forefront: automatic seat belts and air bags.

3. In the early 1970's, designers recognized that by fastening the outboard ends of a seat belt to the interior of the door, and not the frame of the vehicle, the belt could remain attached without impeding entry or exit from the vehicle; *i.e.*, the belt would deploy automatically without any action on the part of the passenger. Assuming that it could also pass the required dynamic crash tests,[8] it would qualify as a Standard 208 passive restraint. Approximately 400,000 vehicles were sold in this country in the period 1975-1981 with automatic belt systems that met the passive restraint standard. Pet. App. 18a-19a, n. 12. Two principal systems and the GM "detachable" belt are illustrated and described in the appendix to this Brief. App. 1a-3a, (Figures 1-3).

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[8] Under the pre-rescission Standard 208, a passive restraint device was required to demonstrate survivability in 30 mph front and 20 mph lateral barrier crashes with anthropomorphic test dummies in the passenger positions. 49 C.F.R. § 571.208-S5, 571.208-S6. Manual belt systems are not subject to these requirements.

When automatic belt systems of any type are available and used, they prove to be very effective safety devices. In its Regulatory Impact Analysis in the agency docket below, NHTSA found that "there is no *a priori* reason that automatic belts cannot perform as well or better than manual belts when they are used." C.A. App. 65. For the user of an automatic belt who has an accident, this translates into a 50% reduction in the probability that it would be fatal and a 65% reduction in the probability that it would cause a serious injury. *Id.*

4. An air bag is the most readily understandable form of automatic crash protection. Completely concealed in the dashboard and steering column, it automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces. The entire sequence takes only a few tenths of a second.[9]

On-the-road experience with approximately 13,000 air bag-equipped vehicles produced in the mid-1970's and over 2,000 crash tests (including 188 with human volunteers), led NHTSA to conclude in 1977 that air bag systems were extremely effective in preventing deaths and reducing injuries, a conclusion that was upheld in *Pacific Legal Foundation v. Department of Transportation*, 593 F.2d 1338, 1344-45 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). NHTSA reaffirmed that conclusion in its Regulatory Impact Analysis below: "[t]he Agency has no basis at this time for changing its earlier conclusions in 1976 and 1977 that basic air bag technology is sound and has been sufficiently demonstrated to be effective in those vehicles in current use, such that it could be considered an acceptable method of compliance with the mandates of the Act." C.A. App. 264. In practical terms, this effectiveness translates into a 40-66% reduction in the probability of a fatal injury, and a 54% reduction in the probability of a serious

[9] NHTSA incorporated into the agency record a short motion picture entitled "Reliable Air Bags." (Exhibit N-22-092). This film explains how air bags work and includes footage of actual crashes with air bag-equipped vehicles. It was viewed by the NHTSA Administrator and staff and was lodged with the court of appeals.

injury, in the event of an accident involving an air bag-equipped vehicle. C.A. App. 65-66.

5. As late as 1980, most manufacturers, facing an initial compliance date of September 1, 1981, intended to provide automatic crash protection with a mix of these automatic belt and air bag systems. C.A. App. 1634-35. In early 1981, NHTSA again solicited the views of the manufacturers, and GM announced that it had cancelled all prior plans and now intended to comply with the "detachable" automatic belt, C.A. App. 1433, a design that basically consisted of moving the emergency release buckle on the 1980 Chevette system approximately 18 to 24 inches to the point where the lap and shoulder belts converge. (Compare Figures 2 and 3, App. 2a, 3a). GM actually installed such a belt on only eighty-seven 1981 Cadillac Sedan De Villes. C.A. App. 104. In the course of the rulemaking proceeding that summer, GM and Chrysler indicated an intention to use detachable belts if required to provide passive restraints; Toyota, Mazda and Subaru indicated "expectations" of using detachable belts; and Ford, Volvo, Renault, Aston Martin and Rolls Royce "expected that the majority of automatic belts would be fully-detachable, without stating their own design plans."[10] Other manufacturers said nothing. On the basis of these representations, NHTSA found in Notice 25 that "most new cars would have had a type of automatic belt that might not have been any more acceptable to the public than manual belts." Pet. App. 92a.

6. The most useful summary of the current status of passive restraint systems was compiled not by NHTSA but by the court of appeals in the context of the disputes over the stay of Notice 25 (the rescission order) and over the stay of the Standard 208 compliance dates. One fact is clear from that record: absent a passive restraint *requirement*, automatic crash protection is *not* going to be widely available to the public in

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[10] Brief for Respondents at 32, *State Farm Mutual Automobile Insurance Co. v. Department of Transp.* 680 F.2d 206 (D.C. Cir. 1982).

the foreseeable future, *i.e.*, consumers will *not* be free to choose fully effective automatic crash protection as an option.[11]

INTRODUCTION AND SUMMARY OF ARGUMENT

There is no disagreement among the parties that the function of a court in determining whether agency action is "arbitrary or capricious" is as set forth in the *Overton Park* and *Bowman Transportation* decisions. Petitioners claim, however,

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[11] a. The first passive restraint compliance date under the pre-rescission Standard 208 was September 1, 1982 for large and medium-size cars. NHTSA found that most manufacturers intended to comply with automatic belt systems. Notice 25 resulted in an abrupt cancellation of all plans for new automatic belt systems. The manufacturers' commitment not to produce these systems was extensive and included the immediate abandonment of the substantial capital expenditures that had already been made. As of today, automatic belt systems are available as options only on the VW Rabbit/Jetta and the Toyota Cressida, and both manufacturers have cancelled their plans for such systems on other models. No other manufacturers have indicated plans for automatic belt systems absent a passive restraint requirement. *See State Farm Mutual Automobile Insurance Co. v. Department of Transp.*, NHTSA Memorandum In Response to the Court's Aug. 4, 1982 Order (Volkswagen letter, Sept. 1, 1982; Toyota letter, Sept. 15, 1982).

b. In 1979-80, GM, Mercedes-Benz and Volvo announced plans for some production of air bag-equipped vehicles, C.A. App. 1477-79, but those plans were subsequently cancelled. No manufacturer has indicated current production plans for a fully effective air bag system absent a passive restraint requirement. NHTSA Memorandum In Response, *supra*.

c. As indicated in the DOT Brief, at 12, n.12, NHTSA has, in recent months, proposed state police and GSA demonstration projects for air bags. According to recent press reports, however, "most of the major domestic automakers interviewed yesterday say they aren't planning to take up the NHTSA offer." *Washington Post*, January 8, 1983, at D9.

d. On January 28, 1983, Mercedes-Benz advised NHTSA that beginning with model year 1984, it will offer a Supplemental Restraint System ("SRS") as an option on some models exported to the U.S. The SRS is a driver-side only inflatable device that does not meet the Standard 208 requirements for automatic crash protection. It is useful, as the name implies, only as a supplement to a seat belt, *i.e.*, "its effectiveness depends on whether or not the active seat belt is in use." *Tax Credits for Installation of Airbags in Automobiles, Hearings Before The Subcommittee on Taxation and Debt Management of the Committee on Finance*, 97th Cong., 2d Sess. 265 (Jan. 28 and March 2, 1982) (letter from Mercedes-Benz to Sen. Danforth, March 3, 1982).

that the court of appeals went beyond its proper role when it refused to defer to the agency's assertions of "substantial uncertainty" about future benefits as an adequate basis for rescinding the automatic crash protection requirement. This, according to petitioners, raises issues of weighty consequence for all administrative action looking toward reducing regulation.

The petitioners are wrong. The arbitrary and capricious standard has meaning only in the context of a particular statute and a particular record. A naked assertion of "uncertainty" as to benefits may be a sufficient basis to rescind a regulation or to refuse to issue one in the first instance where the statute grants broad discretion as to policy and action, where there is a nominal record, or where the agency action does not constitute a sharp departure from a settled course. In *this* case, none of these factors exist.

The Safety Act represents a deliberate choice by Congress to require the imposition of safety standards and force the improvement of safety technology. The record shows over a decade of progress by the agency toward that purpose including the development of new and effective automatic crash protection technology. It then shows, in the order under review, a complete reversal of course. Under these circumstances the agency had an obligation, imposed not by the court but by its own change of direction, to show a rational connection between the record, the statute, and a decision which, by terminating the automatic crash protection requirement and eliminating the safety technology it had engendered, appeared to be contrary to both.

NHTSA made no such showing. Indeed, its decision displays on almost every page a failure to consider relevant factors rationally, factors such as: (1) the effect on usage rates of the automatic feature (as distinguished from the detachability feature) of the proposed automatic seat belts; (2) the effect on usage rates of a warning system NHTSA had prescribed for the purpose of increasing usage; (3) the effect of market forces and product liability considerations on passive restraint design if the standard were not rescinded; and (4) the effect of revising

the standard to require current and practical use-inducing technology.

The decision reflects an equal disdain for the statutory purpose. The Safety Act calls for consideration of costs but in a context where safety is the "overriding" consideration. Even NHTSA's flawed consideration of usage rates showed a potential for lives saved numbered in thousands and serious injuries avoided in tens of thousands. NHTSA found this unimpressive and instead made cost the overriding consideration—a cost ($75 per new car plus $14 for fuel) which it acknowledged would probably be too small to be noticed by consumers, which it acknowledged could be entirely eliminated by savings in insurance premiums, and which its own calculations showed would be largely offset by savings to society from reduced deaths and injuries.

The Safety Act was adopted because Congress found that voluntary safety programs, and industry safety initiatives, were not working. NHTSA's decision dropped a mandatory safety standard in favor of a voluntary educational program on the basis of the industry's "plans." In the process it abandoned the highly effective automatic crash protection technology which had been developed earlier in response to that standard.

ARGUMENT

The "arbitrary and capricious" standard under Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), requires "a thorough probing, in-depth review" of the agency action, the facts and the underlying statutory authority of the agency. *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). *See also Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). The purpose and effect of the Safety Act are discussed in the first section of this argument. In the second section, the rescission order is measured against the Safety Act and the detailed record, with the conclusion that there are four reasons why it was unlawfully issued. The final section deals with petitioners' contentions about the court of appeals opinion.

I. THE SAFETY ACT REQUIRES NHTSA TO FORCE THE DEVELOPMENT AND APPLICATION OF NEW TECHNOLOGY TO REDUCE "SECOND COLLISION" DEATHS AND INJURIES.

The plain meaning as well as the legislative history of the Safety Act indicate that NHTSA is *required* to force the development and application of new technology to reduce the death and injuries resulting from second collisions. It is a statute that does not permit much enforcement discretion on the part of the agency or contemplate significant voluntarism on the part of the regulated industry. To the extent that it requires enforcement efforts to be reasonable and practicable, it nevertheless recognizes that safety is the paramount consideration.

A. Congress Selected A Forceful Regulatory Strategy Rather Than Strategies That Would Have Relied Upon Voluntary Efforts And Industry Initiative.

The basic statutory scheme is mandatory rather than precatory.[12] NHTSA has a mandate to issue safety standards

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[12] The stated purpose of the Safety Act is to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." The issuance of motor vehicle safety standards, which the Secretary of Transportation "*shall* establish by order," is the primary means of regulation. Such standards must be "practicable," must "meet the need for motor vehicle safety" and must be stated in objective terms. 15 U.S.C. § 1392(a) (emphasis added). "Motor vehicle safety" is defined as protection against "unreasonable risk of accidents" and "unreasonable risk of death or injury to persons in the event accidents do occur," 15 U.S.C. § 1391(1), reflecting the emphasis on both accidents and second collisions. In fixing standards the Secretary is directed to consider various factors, including whether the standard will "contribute to carrying out the purposes of this Act" and whether it will be "reasonable, practicable and appropriate for the particular type of motor vehicle." 15 U.S.C. § 1392(f).

Once a safety standard is established by order, it must become effective within 180 days to one year unless the Secretary can demonstrate that an earlier or later date is in the public interest. 15 U.S.C. § 1392(c). Manufacturers self-certify their compliance, and NHTSA's remedies against a failure to certify, false certification or subsequent noncompliance include civil penalties, 15 U.S.C. § 1398, injunctive relief, 15 U.S.C. § 1399, and repurchase/recall orders. 15 U.S.C. § 1414. General exemptions from safety standards are available only in circumstances in which the exemption would produce an equivalent or higher level of safety; and "economic hardship" exemptions are available only to manufacturers producing 10,000 or fewer vehicles in a year. 15 U.S.C. § 1410.

that effectively address the second collision problem, and those standards are to be pushed beyond the limits of existing technology to the extent practicable. That mandate represents a clear determination by Congress to have the Federal government play an active, aggressive role in advancing the cause of motor vehicle safety, a decision to propel, not merely lead, the auto industry toward increased safety. This purpose is also confirmed by the legislative history, a history which reveals that Congress specifically rejected the regulatory strategy that NHTSA is now intent on following.

Prior to 1960 Congress had shown interest in auto safety but had done little about it. Three pieces of safety legislation had been enacted[13] but, in general, Congress had allowed the auto industry to take the lead. The industry had engineered safety improvements in brakes, lights and suspension systems,[14] but no serious inroads had been made on the enormous toll of death and injury. When Congress began to consider the safety issue in earnest in the second session of the 89th Congress, this failure of previous safety efforts, and the human and economic cost of that failure, became a recurrent theme: 50,000 Americans were being killed in auto accidents each year, and 1,800,000 injured; this "grim toll" and its cost to society—exceeded only by major wars and diseases—had to be stopped!

Three different regulatory strategies were considered by the 89th Congress. First, the Administration bill (H.R. 13228 and S. 3005, 89th Cong., 2d Sess. (1966)) would have given the Executive Branch broad authority to require that safety be addressed by manufacturers, but made the exercise of that

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[13] This earlier legislation reflected a very cautious approach by Congress: one set standards for hydraulic brake fluid, Pub. L. No. 87-637, 76 Stat. 437, 15 U.S.C. § 1301 (September 5, 1962) (repealed 1966); another set certain minimum standards for manual seatbelts, but did not require them, Pub. L. No. 88-201, 77 Stat. 361, 15 U.S.C. § 1321 (December 13, 1963) (repealed 1966); and a third authorized the General Services Administration to set a wider range of standards for cars to be bought for the Government's fleet. Pub. L. No. 88-515, 78 Stat. 696, 40 U.S.C. §§ 701-03. (August 30, 1964).

[14] S. Rept. No. 1301, 89th Cong., 2d Sess. 2 (1966) [hereinafter cited as Senate Report].

authority largely discretionary. Second, amendments to the Administration bill proposed by the industry would have permitted the Secretary to set a standard only after following a complicated procedure and only where he could make explicit findings of fact pertaining to the relative costs and benefits of any proposed standard. Finally, the Mackay bill (H.R. 12548, 89th Cong., 2d Sess. (1966), introduced by Rep. Mackay) favored an approach that retained the broad authority of the Administration's bill but made the exercise of that authority *mandatory*.[15] Congress adopted the latter approach in the Safety Act.

1. *The major concern of Congress was the "second collision" problem.* While the Safety Act reflects a Congressional concern with all aspects of motor vehicle safety, its legislative history indicates that the major concern was death and injury due to the "second collision" of the occupant with the interior of the automobile.[16] No other aspect of auto safety so attracted the concern and attention of the Congress.

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[15] The Administration and Mackay bills are reproduced, in pertinent part, in the appendix to this Brief. (App. 25a-31a, 32a-45a) The industry proposal appears in full in *Traffic Safety: Hearings Before the Interstate & Foreign Commerce Committee, House of Representatives*, Part 2, 89th Cong., 2d Sess. 1198 *et seq.* (1966). It is outlined in a submission of the Department of Justice, 112 Cong. Rec. 19640 (Aug. 17, 1966), which is reproduced in its entirety in the appendix to this Brief. (App. 4a-24a)

[16] The House Committee Report began its explanation of the need for the legislation with a few sentences decrying the toll of deaths and injuries. It then turned immediately to the second collision: "[p]assengers riding in vehicles moving at speeds of 60 and 70 miles per hour or even higher speeds need to be protected in the event that an accident does occur. The committee is satisfied that such protection can be afforded at least to a degree substantially greater than that which exists at present, if all reasonable steps are taken to minimize the impact which results after an accident occurs between two vehicles or a vehicle and a stationary object." H.R. Rept. No. 1776, 89th Cong., 2d Sess. 10 (1966) [hereinafter cited as House Report]. This concern was echoed by the Senate Committee. *See* Senate Report at 3. It also surfaced repeatedly in the floor debate. *See* 112 Cong. Rec. 21490 (Senator Cotton); 14221 (Committee Chairman Magnuson); 14237 (Sen. Cotton); 14255 (Sens. Byrd and Yarborough); 19630 (Rep. Springer); and 19633 (Rep. Moss) (1966).

2. *Congress required the issuance of mandatory standards.* At the threshold of committee consideration were two questions: should the Executive Branch be required to issue safety standards in the first instance; and should compliance with safety standards be mandatory or voluntary?

The reports indicate no sentiment for a discretionary or voluntary approach. The House Committee noted that, with few exceptions, witnesses at its hearing "favored the imposition of mandatory Federal Safety standards." House Report at 12. The Senate Committee listed the following as first among six "basic needs" to be served by Federal legislation: "[t]he promotion of motor vehicle safety through voluntary standards has largely failed. The unconditional imposition of mandatory standards at the earliest practicable date is the only course commensurate with the highway death and injury toll." Senate Report at 4.

As to whether the issuance of standards should be required, the Administration bill would have given the Secretary the authority to impose standards if he found that existing standards (imposed by various states and federal agencies such as GSA) were inadequate. Such determination could not be made until two years after enactment. There was no requirement that the Secretary promulgate any standards. Both the House and Senate committees pointedly rejected this approach, noting that the bills before them *required* the promulgation of safety standards. This choice was also repeatedly emphasized in the floor debates.[17]

Congress also made clear that it was not prepared to accept delays in the promulgation of standards. The Administration bill provided that the Secretary should have two years within which to decide whether to promulgate new safety standards in addition to those then in effect. Congress, however, directed the Secretary to issue, before January 31, 1967, initial safety standards based upon those already in existence and revised standards the following year. 15 U.S.C. § 1392(h).

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[17] *See* House Report at 15, 16; Senate Report at 2; 112 Cong. Rec. 19629 (Chairman Staggers), 19630 (Rep. Springer), 19633 (Rep. Moss); 19653 (Rep. Sickles), 19654 (Rep. Tenzer) and 14230-31 (Sen. Ribicoff) (1966).

3. *Congress directed the Secretary to force the development and application of new technology.* Another major issue facing the Congress was whether to continue to rely entirely on the industry to improve safety technology. It is clear from the legislative history that Congress was thoroughly dissatisfied with the industry's safety initiatives up to that time.[18] The choices made in the markup illustrate how that dissatisfaction evolved into a determination that safety technology no longer be dependent on what the industry alone offered. For example, the industry bill would have placed responsibility for initiating standards upon an existing multi-state commission, subject to individual state ratification and dependent almost entirely on the industry for safety research. App. 9a. In a letter to the committees on behalf of the Administration, the Justice Department analyzed in detail how the proposed procedure would produce long delays and watered down standards, with "the timing and introduction of new safety devices largely in the hands of the industry." *Id.* at 7a. This approach was rejected in favor of a provision that the "Secretary *shall establish* by order appropriate Federal motor vehicle safety standards." 15 U.S.C. § 1392(a) (emphasis added).

The Administration bill recognized the need for the Federal government to develop its own capability to initiate new technology. It provided that the "Secretary . . . *is authorized* to undertake appropriate research, testing and development for motor vehicle safety and motor vehicle safety standards . . . ." H.R. 13228, 89th Cong., 2d Sess. § 104 (1966); App. 36a (emphasis added). This approach was also rejected in favor of a provision that the "Secretary *shall* conduct, research, testing, development and training necessary to carry out the purposes of this title," 15 U.S.C. § 1395(a) (emphasis added), and a requirement that such results *shall* be considered in the promulgation of standards. 15 U.S.C. § 1392(f)(1) (emphasis

[18] "The committee met with disturbing evidence of the automobile industry's chronic subordination of safe design to promotional styling, and of an overriding stress on power, acceleration, speed, and ride to the relative neglect of safe performance or collision protection. The committee cannot judge the truth of the conviction that 'safety doesn't sell,' but it is a conviction widely held in industry which has plainly resulted in the inadequate allocation of resources to safety engineering." Senate Report at 2.

added). The committee reports and floor debate leave no doubt that the choice of this language was intentional.[19] The legislative history also makes clear, however, that Congress did not intend that the agency's research efforts would serve as a substitute for the "creative energies and vast technology of the automobile industry" which would be triggered by the imposition of performance (rather than design) standards. Senate Report at 1, 6.

In *Chrysler Corp. v. Department of Transportation*, 472 F.2d 659 (6th Cir. 1972), the manufacturers argued that a safety standard, and specifically a passive restraint requirement, could not go beyond on-the-shelf technology. Noting the industry proposal rejected by Congress in 1966, the court stated that "we must decline to write into the Act the very same suggestions which Congress declined to write into the Act." *Id.* at 672 n. 16. Finding that Congress intended the Safety Act to be "technology forcing," an interpretation concurred in by NHTSA in Notice 25, Pet. App. 116a, the court went on to explain that purpose as follows: "the explicit purpose of the Act, as amplified by its legislative history, is to enable the Federal government to impel automobile manufacturers to *develop and apply* new technology to the task of improving the safety design of the automobile as readily as possible." 472 F.2d at 671 (emphasis added).

B. Congress Ruled Out A Strict Cost/Benefit Analysis For Safety Standards. Instead, Safety Must Be The Paramount Consideration Whenever Costs Are Considered.

The industry also proposed that the Secretary adopt a substantially different method of balancing costs and benefits than that adopted in the Safety Act. Section 102(h) of the industry bill listed a number of factors required to be considered by the Secretary in promulgating standards. One provided that: "[t]he benefit to be derived by any Federal motor vehicle

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[19] "The Federal government must develop ... a technical capacity *capable of initiating innovation* in safety design and engineering ...; and ... capable of developing and implementing meaningful standards for automotive safety." Senate Report at 4 (emphasis added). *See also* 112 Cong. Rec. 19635 (Rep. Mackay) (1966).

safety standard should be *clearly warranted* in light of all relevant factors." App. 15a. Another factor provided that standards should embody *feasible* devices and techniques that are available in a reasonable time *and at costs commensurate with "the benefit to be achieved."* *Id.* The Administration opposed these provisions as "overly protective to industry interests," "weighted against the desirability of action," and likely to impair the effectiveness of safety standards. *Id.* at 7a-8a.

Congress not only failed to adopt these industry proposals, it made clear that it had in mind an entirely different calculus. Both committees dealt specifically with the question of how to balance costs against improved safety. The House Committee stated that consideration of whether a standard would be "practicable" required consideration of "all relevant factors including technological ability to achieve the goal of a particular standard as well as consideration of economic factors." However, it went on to state in the next sentence that "motor vehicle safety is the *paramount purpose* of this bill and each standard must be related thereto." House Report at 16 (emphasis added). The Senate Committee similarly stated that cost was relevant but secondary to safety: "[t]he committee intends that *safety shall be the overriding consideration* in the issuance of standards under this bill." Senate Report at 6 (emphasis added).[20] The bills adopted by the House and Senate committees were very similar and provoked little controversy in the floor debate, a debate characterized by a parade of speakers deploring the highway death toll and commending the committee action. The roll call vote in each house was unanimous. 112 Cong. Rec. 14256 (June 24, 1966) (Senate), 19669 (Aug. 17, 1966) (House).

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[20] A colloquy on the floor between Commerce Committee Chairman Magnuson and Senator Lausche was addressed to this language in the Report. It made clear that the language allowing for consideration of costs but declaring safety to be the overriding consideration was specifically intended to be used as an aid in interpreting the terms "reasonable," "practicable" and "appropriate," especially with reference to the question of how much the Secretary should consider "the cost that would be added to the automobile." 112 Cong. Rec. 14245 (1966).

II. MEASURED AGAINST THE SAFETY ACT AND THE RECORD, THERE ARE FOUR REASONS WHY RESCISSION OF THE AUTOMATIC CRASH PROTECTION REQUIREMENT WAS UNLAWFUL.

NHTSA's explanation in Notice 25 for its decision to terminate the automatic crash protection requirement was deceptively simple. Noting the recently announced intention of some manufacturers to rely on the detachable automatic belt for compliance, NHTSA concluded that it could not predict with certainty more than a "possibly minimal" increase in belt usage over that experienced with manual belts and that this "possibly minimal" benefit would be offset by increased costs and other risks. After rejecting the possibility of interpreting or amending Standard 208 to eliminate this perceived loophole, NHTSA concluded that its only alternative was to rescind and to rely in the future on manual belts and an educational campaign.

The practical effect of Notice 25 was to turn the clock back to the period before 1966 when voluntarism, industry initiative and educational campaigns were the norm, when safety technology depended entirely on what the manufacturers saw fit to develop and offer. At the very least, this dramatic reversal of the statutory mandate required some rational explanation by NHTSA, or, as the court of appeals stated, "[a]n agency is seldom locked on course, but it must have increasingly clear and convincing reasons the more it departs from the path marked by Congress." Pet. App. 48a.

Notice 25 also wrote off a decade of carefully recorded and analyzed experience with automatic crash protection on the grounds that none of it was precisely on point with the anticipated future reliance on detachable automatic belts. This reflected a fundamental misunderstanding of the purpose of the Safety Act. Under a technology forcing scheme, there can never be experience that is precisely on point. The situation with respect to automatic crash protection was unusual in this respect only to the extent that: (1) there was an enormous record supporting the need for, and efficacy of, automatic crash protection devices; and (2) the record made it equally clear

that manual seat belts were an unacceptable alternative. Again, NHTSA was required to offer something other than a nonrational explanation for ignoring this record.

Four basic subjects were discussed in varying degrees in Notice 25—usage rates, costs versus benefits, the effect of rescission and alternatives less drastic than rescission. In each instance, NHTSA's discussion was arbitrary and capricious, in direct contravention of the Safety Act, or both.

A. NHTSA's Conclusions About The Possible Usage Rate For Detachable Automatic Belts Ignored Both The Record And Common Sense.

1. *NHTSA emphasized the detachability feature while largely ignoring that the belts would also be automatic.* NHTSA's explanation of why detachable automatic belts would generate little or no increase in usage is set forth in the margin.[21] NHTSA's pessimistic views about future usage rates rested essentially on that reasoning. While NHTSA's statements in Notice 25 about future usage rates varied considerably, all rested on the premise that detachable automatic belts, because they are detachable, "differ little from existing manual belts." Pet. App. 112a.[22]

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[21] "Most planned automatic belts would be like today's manual lap and shoulder belts in that they can be easily detached and left that way permanently.

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"Some belt designs may be detached and permanently stowed as readily as the current manual lap and shoulder belts. Once a detachable automatic belt is detached, it becomes identical to a manual belt. Contrary to assertions of some supporters of the standard, its use thereafter requires the same type of affirmative action that is the stumbling block to obtaining high usage levels of manual belts. If the car owners perceive the belts as simply a different configuration of the current manual belts, this stumbling block is likely to remain. They may treat the belt as a manual one and thus never develop the habit of simply leaving the belt attached so that it can act as an automatic belt." Pet. App. 97a-99a.

[22] NHTSA's usage rate findings aside, *any* automatic belt differs from a manual belt in one significant respect: it has passed the dynamic testing requirements of Standard 208, *i.e.*, it has demonstrated survivability in actual

(footnote continues)

NHTSA's analysis was utterly irrational. The seat belts in question are detachable, but they are *also automatic!* It was incumbent upon the agency to give at least some rational consideration to the impact on usage rates of the automatic feature as well as the detachability feature. Common sense suggests that any device which works automatically will attract greater usage than a manual device. There is no intuitive reason why that would not be true of seat belts.

NHTSA need not have speculated, however, about intuitive probabilities. There was abundant evidence in the record confirming that automatic belts would generate increased usage simply because they are automatic. Notice 25 revealed no serious consideration of that evidence. It did mention, in two places, the possibility that automatic operation would generate increased usage, but in both instances its discussion was irrational or incomprehensible. First, the record evidence:

a. *The record established the effectiveness of any automatic belt.* Over a period of years prior to the issuance of Notice 25, NHTSA commissioned a variety of surveys of public attitudes in an effort to better understand why people were not using manual seat belts and how they would react to passive restraints. The results of those surveys are in the record. The surveys reveal a consistent "hard core" of 20-40% of the population which is firmly opposed to wearing manual seat belts and is not likely to respond to efforts to encourage usage. C.A. App. 93. For the rest of the population, the surveys show the reasons for nonusage are of the more everday variety, the same type of reasons people find themselves without keys or umbrellas when they need them. In one survey, for example, 68% of the respondents gave "bothersome" "inconvenient" or

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(footnote continued)

crash tests. A manual belt, on the other hand, must meet only static test requirements establishing the strength of its various components. Although this does not necessarily mean that manual belts are unsafe, it does mean that the effectiveness of an automatic belt is assured with a higher degree of certainty.

"forgot" as reasons why they did not use their manual seat belts regularly. C.A. App. 81. In another survey, the respondents were asked why they thought people do not wear seat belts very much. "Too much time/hassle" and "not in habit/don't think about it/lazy" were reasons given by 47%. C.A. App. 1110. These, of course, are the very excuses that are eliminated by an automatic seat belt.

NHSTA also commissioned several surveys asking the general public specifically about automatic belts. A telephone survey taken in 1979 asked respondents what they thought about the idea of automatic seat belts in the next car they purchased. Over 63% said it was a great idea or at least one they would tolerate, compared to 32% who said they would disconnect the device. C.A. App. 93. A number of "focus groups" were convened at NHTSA's behest to discuss in greater depth with members of the general public their attitudes toward seat belts. These revealed a positive reaction to automatic belts and indicated that a common reaction to automatic belts was "relief" that they resolved people's "conflict between what they should do and what they actually do." C.A. App. 96-97.

Finally, NHTSA conducted extensive surveys among users of automatic belts in the two cars where such belts had actually been employed—the VW Rabbit and Chevrolet Chevette. Those surveys resulted in a wealth of information on both usage rates and attitudes toward such belts. The usage rate information consistently revealed more than a doubling of the rate experienced with manual belts. Pet. App. 18a-19a n.12. NHTSA devoted considerable attention to explaining why it refused to give any weight to that data. There was no discussion, however, of the *attitude* survey results.

The results of the attitude surveys are significant because they showed a shift of attitudes in favor of automatic belts over manual belts *based on actual experience with such belts.* For example, Rabbit and Chevette owners were asked to compare their first impression of automatic belts with their impressions after using them. In all cases the later impression was more favorable toward automatic belts. C.A. App. 92. Another survey question revealed that convenience, comfort, and

automatic operation ranked high among reasons owners liked their automatic belts and as reasons survey respondents would choose automatic belts in the next car they purchased. C.A. App. 942. Another series of questions asked whether 1980 Rabbit and Chevette owners would prefer an automatic belt in their next car. The answers are significant when compared to the percentage who appeared to be predisposed toward automatic belts at the time they bought a car so equipped: only 5% of the Chevette owners had specifically requested an automatic belt, but *44%* said they would prefer to also have one in their next car; and the comparable numbers for Rabbit owners were 12% "before" and *74%* "after." C.A. App. 90.

NHTSA had an obligation to consider rationally this evidence. Whatever the validity of the agency's refusal to give any weight to evidence of usage rates on Rabbits and Chevettes with automatic belts,[23] the reasoning applicable to the usage rate evidence was not applicable to the attitude evidence. For example, the ignition interlock on the Rabbit and 1978-79 Chevette arguably may have biased usage rates upward, but if it had any affect on attitudes, it was *negative*.[24] Similarly, NHTSA's concerns about the effect of demographics and voluntarism on usage data, however valid, have little applicability to the attitude survey results.[25] In any case, none of NHTSA's reasons for rejecting the usage data apply to the surveys which measured changes in attitudes toward automatic belts within the same group of survey respondents.

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[23] The court of appeals correctly noted that "NHTSA's reasons for refusing to extrapolate from the available data are extremely weak." Pet. App. 52a-53a, n.30.

[24] For example, the record shows an 89% usage rate for the 1980 Rabbit with automatic belts. C.A. App. 89. Sixty-seven per cent of 1980 Rabbit owners indicated they would use their automatic seat belt even if there were no interlock, i.e., if it were fully detachable. C.A. App. 92. The latter figure, while lower than the usage rate, is still highly significant in an absolute sense.

[25] The survey data showed that a very small percentage of either the Chevette (5%) or Rabbit (12%) owners actually sought to acquire a car with automatic belts. C.A. App. 90, thus negating any effect voluntarism might have on the results. Similarly, there is no evidence that demographics is generally a factor in these surveys. In fact, the 1981 National Seat Belt Study found that "demographic and geographic data suggest that seat belt wearing is a behavior which perhaps more than most behaviors tends to cut across those usual lines of characterization." C.A. App. 1119.

NHTSA's failure to give any weight to this evidence is particularly indefensible when it had before it the analysis of its principal survey contractor, Opinion Research Corporation, as to what the results meant: "there is considerable evidence in both the current and previous studies that the automatic belt is superior to the manual belt as a use-inducing device. It can be expected that safety belt use among U.S. drivers will trend upwards as more new cars come equipped with the automatic restraint system." C.A. App. 1010.

Compounding this arbitrariness was the fact that the agency devoted considerable attention to public attitudes on other issues in the absence of supporting evidence. For example, one of NHTSA's reasons for rejecting any passive seat belt was the public's "fear of entrapment" by seat belts. NHTSA described this fear as "widespread." Pet. App. 110a. In fact, it was a reason given by only 7% of the respondents in the 1981 National Seat Belt Study. NHTSA chose to ignore other responses that established the amenability of at least 47% of the respondents to automatic features. C.A. App. 1108.

Even more remarkable was NHTSA's readiness to speculate that public attitudes toward safety or passive restraints would be adversely affected by continuing the passive restraint program. This was identified by NHTSA as the "principal risk" of continuing Standard 208. Pet App. 114a. NHTSA's conclusions in this respect—except as they might apply to "hard core" nonusers—have no evidentiary support. No attitude surveys were cited to justify NHTSA's fears and there were none. At the same time, the survey evidence which showed receptive attitudes toward automatic belts was ignored.

b. *NHTSA did not rationally discuss this record.* The possibility that automatic belts would generate increased usage simply because they are automatic was mentioned twice in Notice 25. On both occasions NHTSA's discussion was nonrational. NHTSA's first consideration of the issue was the following statement:

> The agency recognizes the possibility that the exposure of some new car purchasers to attached automatic belts may convert some previously occasional users of manual belts to full time belt users.

> Present attitudinal survey data clearly establish the existence of a population of such occupants who could be influenced by some external factor to convert to relatively constant users. However, the agency believes that many purchasers of new cars having detachable automatic belts would not experience the potential use-inducing character of attached automatic belts unless they had taken the initiative themselves to attach the belts.

Pet. App. 99a.

The final sentence presumably explains NHTSA's thinking. It is, to say the least, puzzling. First, the agency seems to be saying that automatic belts would not be used because the occupant would have to take the initiative to attach the belt. However, the essence of an automatic belt is that it does not need to be attached. It automatically makes the decision to "buckle up." Second, NHTSA may be saying that if an automatic belt is detached, it may never be reattached for reasons of laziness or forgetfulness. This implies, however, that occupants will detach automatic belts with the same frequency they fail to attach manual belts—a conclusion contradicted by common sense and the evidence, especially since the population at issue consists of "previously occasional users of seat belts." In any event, the 4-8 second audible warning and continuous (until the belt is pulled out or attached) warning light required by Standard 208, *see infra* p. 25, would remind forgetful drivers that their automatic belts were detached.

NHTSA's second occasion for addressing this matter was in its "Summary of Agency Conclusion." The discussion began as follows :

> Certainly, while a large portion of the population appears to find safety belts uncomfortable or refuses to wear them for other reasons, there is a sizeable segment of the population that finds belts acceptable but still does not use them. It is plausible to assume that some people in this group who would not otherwise use manual belts would not disconnect automatic belts.

> It is this same population that will generate all of the benefits that result directly and solely from this regulation.

Pet. App. 113a.

The "sizeable segment" referred to is necessarily the 60-80% of the population who are not "hard core" nonusers. NHTSA's statement would thus seem to indicate a substantial increase in usage. NHTSA did not deny this. Instead its analysis went on as follows:

> This is a population that can also be reached in other ways. The Agency, state governments and the private sector are in the process of expanding and initiating major national belt use educational programs of unprecedented scale. While undertaken entirely apart from the pending proceeding, the fact remains that this effort will predominantly affect the same population that the automatic belts would be aimed at.

Pet. App. 113a-114a.

Apart from the fact that Congress created NHTSA to establish *mandatory standards* rather than to conduct voluntary programs, this thought raises the obvious question: would not an educational program *with* automatic belts increase usage even more? NHTSA's next sentences attempted to address this: "On the one hand, it could be argued that the success of any belt use program would only be enhanced by the installation of automatic belts. Individuals who can be convinced of the utility of safety belts would presumably have an easier time accepting an automatic belt." Pet. App. 114a. This sensible notion was, however, immediately rejected with another question-begging nonsequitur: "On the other hand, there is little evidence that the standard itself will materially increase usage levels above those otherwise achievable." *Id.*

Thus, in the course of a few sentences, NHTSA: (1) acknowledged that automatic belts could increase usage by a large segment of the population because they are automatic; (2) acknowledged that such use could be increased even further by a public educational campaign; but (3) rejected the

whole concept because automatic belts will *not* materially increase usage! This was NHTSA's entire discussion of the question of whether passive belts, even if detachable, would generate significant increases in usage because they are automatic. Rational decision making simply does not permit NHTSA to answer that fundamental question by reiterating in different words that the belts are detachable.

2. *NHTSA also failed to consider the effect on usage rates of the emergency release warning light, a warning light intended to discourage detachment of automatic belts.* NHTSA's repeated emphasis on the similarities of detachable automatic belts to manual belts also ignored the warning system required by Standard 208 for automatic belts when the emergency release mechanism is activated. The requirement for manual belts is a 4-8 second continuous or flashing light when the ignition is turned on, coupled with a 4-8 second audible signal if the belt is not fastened. (The Safety Act proscribes a "continuous buzzer" requirement, but not other audible signals.) 49 C.F.R. § 571.208-S7.3. By contrast, automatic belts are required to show a flashing or continuous warning light *at all times* if the belt is detached (and until it is reattached or pulled out). 49 C.F.R. § 571.208-S4.5.3.3. This different warning system was deliberately adopted to help assure that automatic belts were not left in the detached position.[26]

The record, moreover, contained evidence bearing directly on the effectiveness of warning lights combined with automatic operation in inducing belt usage. A survey taken by General Motors between November, 1978 and April, 1979 measured usage rates in a fleet of 90 rental Chevettes in Orlando, Florida. C.A. App. 94-95. Five different combinations of belts and

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[26] "In order to insure that vehicles occupants are aware if their passive belts are inoperable because a release mechanism has been activated, this amendment specifies that the warning light, "Fasten Belts," remain illuminated until the belt latch mechanism has been fastened or the release mechanism has been deactivated .... The agency believes a continuous warning light is essential since this amendment will allow various types of unfamiliar release systems for passive belts." 43 Fed. Reg. 52493, 52494 (Nov. 13, 1978). C.A. App. 1705, 1706.

"reminder systems" were tested, with 18 cars configured to each combination. Belt usage was recorded electronically. One of the five systems consisted of a detachable automatic shoulder belt and manual lap belt. The warning system for the shoulder belt was essentially the same as that required by Standard 208 for automatic belts—a 4-8 second buzzer and a light that remained on as long as the shoulder belt was detached. The survey, based on 13,200 ignition starts, showed 23% usage of the automatic shoulder belt compared to 13% for the manual lap belt.[27]

GM concluded that the 23% usage rate for the automatic shoulder belt with a warning light was relatively ineffective. GM Submission to Docket #74-14, N22, 74-14-NPRM-N22-068. This was correct only in relation to a striking 57% usage rate on another tested restraint system which employed a continuous audible warning as well as a flashing light if the belt was detached. The significance of the GM data for this case—apart from illustrating how easy it would be for GM to remedy the problems it perceives with detachable belts—is that they revealed that a detachable automatic belt with a warning light such as that required by Standard 208 *increased belt usage by ten percentage points* over manual belts with manual belt warning systems.

A ten percentage point increase would almost double present usage. A ten percentage point increase in usage would save approximately 1800 lives and 36,000 serious injuries each year. *See infra* p. 29. While ten percentage points may be relatively ineffective in relation to what NHTSA could achieve with audible as well as visual warnings, it is strongly suggestive of what NHTSA could achieve simply by allowing Standard 208 to take effect. As such, it would be the largest single step toward reducing second collision deaths and injuries since passage of the Safety Act seventeen years ago.

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[27] One of the other systems tested was a standard manual belt with the required 4-8 second warnings. It also produced a 13% usage rate.

Notice 25 gave no consideration to this GM survey data, and it was discussed only briefly, and illogically, in the Regulatory Impact Analysis.[28] In any event, this was evidence which required fuller and more rational consideration than NHTSA gave it.[29]

B. NHTSA's Method Of Cost/Benefit Analysis Was Inconsistent With The Safety Act.

NHTSA justified rescission by weighing the "uncertain benefits" of the least effective passive restraint technology against a projected cost of $980 million and the risk of an adverse public reaction. This justification was, of course, undermined by NHTSA's failure to analyze rationally the life saving benefits of detachable automatic belts, as discussed above. However, even if NHTSA's conclusions on usage rates were rational, its analysis of risks and costs in relation to benefits would still have to be set aside as arbitrary and capricious and contrary to the Safety Act.

As discussed in the context of the legislative history of the Safety Act, *infra* p. 15-16, NHTSA's consideration of safety standards is most emphatically not to be based on a strict

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[28] The Regulatory Impact Analysis concluded that although the survey did "demonstrate the relative efficiency of use-inducing systems," the results could not be used because the car renters might have thought that "the buzzer or light doesn't work correctly, etc." C.A. App. 94. If that was correct, however, it would mean that the survey results were *understated in terms of usage*.

[29] Another use-compelling feature not discussed by NHTSA related to the GM-type belt, the only detachable automatic belt produced to date. As shown in Figure 3, App. 3, once that belt is detached, the loose ends leading to the door do not retract but instead must be refastened to the front of the door. Thus, rather than "out of sight, out of mind," the detached belt is draped across the door, a constant reminder that the automatic feature is not being used. Given the ingenuity of the manufacturers, a retractor of some sort could probably be added to negate this bothersome reminder of automobile safety, but the point is that it was *not* added to the only detachable belt that NHTSA actually had before it.

cost/benefit analysis.[30] Congress specifically rejected this approach and required, instead, a balancing test where cost is secondary and safety "overriding" or "paramount." In other words, the balancing was to be biased *in favor of safety.* NHTSA acknowledged as much in its Regulatory Impact Analysis, C.A. App. 276, but its analysis in Notice 25 directly contradicted this mandate.

1. *It was biased against probable safety benefits.* NHTSA's decision rests heavily on the kind of generalized cost/benefit analysis summed up in the following statement from Notice 25: "[i]n view of the possibly minimal safety benefits and substantial costs of implementing the automatic restraint requirements, the agency is unable to conclude that the incremental costs of the requirements are reasonable. The requirements are, in that respect, impracticable." Pet. App. 105a. In other words, NHTSA balanced forecast costs not against forecast benefits, but against worst case ("possibly minimal") benefits. Conventional cost/benefit analysis in the context of public health and safety regulation has frequently been criticized as biased because it is usually much easier to identify and quantify costs than benefits. NHTSA's approach added another, more significant kind of bias to the process.

It is difficult to know exactly what NHTSA meant by "possibly minimal" increases in usage rates and safety benefits. In its April, 1981 Notice of Rulemaking the Agency assumed a *minimum* usage rate of 22% or double present usage. Pet. App. 100a. Notice 25 adopted a more pessimistic tone without citing any specific evidence to support the change. The agency's pessimism was, however, evidenced in a variety of statements on usage rates, no two the same.

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[30] *Cf. American Textile Mfrs. Inst. v. Donovan,* 452 U.S. 490, 510 (1981) ("When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.") NHTSA only has this authority when it considers the imposition of bumper standards, non-safety regulations that carry with them a specific statutory requirement for a cost/benefit analysis. *See* Motor Vehicle Information and Cost Savings Act of 1972, Section 102(b)(1), 15 U.S.C. § 1912(b)(1) (1976).

At one point the agency said it "cannot reliably predict even a 5 percentage point increase." Pet. App. 104a. The operative word seems to be "reliably" since in the same paragraph NHTSA said it " . . . is unable to assess the probability that the actual incremental usage would fall near a 0 percentage point increase or nearer some higher value like a 5 to 10 percentage point increase." *Id.* Other statements by NHTSA suggest, however, that it did not seriously entertain the possibility of a zero increase in usage. For example: "[o]n the other hand, the agency is not able to agree with assertions that there will be absolutely no increase in belt use as a result of automatic belts." Pet. App. 113a. Later, NHTSA seemed certain of at least an increase of several percentage points: "[t]he agency has now determined that there is no certainty that detachable automatic belts would produce more than a *several* percentage point increase in usage." Pet. App. 118a (emphasis added). NHTSA then went on to consider, for the first time, that not all cars would be equipped with detachable automatic belts. NHTSA acknowledged that "[t]he small number of cars that would have been equipped with automatic belts having use inducing features or with airbags would not have added more than *several more percentage points* to that amount." *Id.* (emphasis added). This additional "several" percentage points of increase appears to be conservative. *See infra* p. 35-36. In any event, combining the *several* percentage points of increase from detachable automatic belts with the *several* percentage points of increase from "use inducing" belts and air bags, a total usage rate increase in the 5% to 10% range would appear to be consistent with NHTSA's own findings.

Despite NHTSA's vague and contradictory observations about usage rates, it is possible to reach some conclusions about lives and injuries saved under the agency's worst case approach to benefits. According to the Regulatory Impact Analysis, each percentage point increase in usage will avoid 180 deaths and 3600 serious injuries each year. C.A. App. 147, 118.[31] Thus, an increase of only ten percentage points, which NHTSA regards

[31] NHTSA's figures assume a fleet fully equiped with passive restraints. Lives saved and injuries prevented each year would be less until that point is reached.

as possible (and originally regarded as minimal) would avoid 1800 deaths and 36,000 injuries. To save 1,000 lives and 20,000 serious injuries would require an increase of only 5.6 percentage points.

These potential savings in lives and injuries in relation to percentages of belt usage are based on actual experience—not, as in many other federal health and safety programs, on projections of inadequate data into unknowable benefits.[32] In absolute terms they are obviously substantial—a life saving potential counted in the thousands and reduced injuries counted in tens of thousands. It is inconceivable that the Congress which passed the Safety Act, a Congress which saw the problem not in the impersonal terms of usage rates, but in terms of death and injury and consequent human suffering and economic loss, intended the agency to turn its back on that potential unless there was compelling evidence that it was not "practicable" to achieve it.

2. *It was biased in favor of improbable costs.* By a series of calculations which erred heavily on the side of overstatement, NHTSA found that automatic belts would add an average of $75 [33] to the retail price of a new car plus fuel costs of $14. In 1981, the average new car sold for approximately $9,000. C.A. App. 227. Thus, a $75 increase in the purchase price for automatic seat belts would add less than 1% to the price of an average new car, far less than typical sales taxes, dealer preparation charges and many options. As the Regulatory

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[32] *Cf. Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 652 (1980) (OSHA benzene standard based on "safety factor of 10-100").

[33] The $75 estimate is the projected increase in the retail price attributable to an automatic belt, including profit for dealer and manufacturer. C.A. App. 210. It is based on a range of possible belt designs including some with features not required by Standard 208, features which in some cases (*i.e.*, easy storage and retractors/reels) could encourage detachment. By perverse logic these costs have been included because they allegedly increase consumer acceptance and "usage is a function of consumer acceptance . . . ." C.A. App. 202. The $75 estimate compares to an actual retail price of $50 for automatic belts in the VW Rabbit and $65 for the Chevette. C.A. App. 168. At several places in Notice 25, NHTSA appears to erroneously indicate that $89 is the increase in the retail price. Pet. App. 105a, 112a.

Impact Analysis acknowledged, the increase in cost attributable to automatic belts is such a small portion of normal price increases on new cars that it "may go undetected by consumers." C. A. App. 219. NHTSA nevertheless concluded that a price increase too small to be detected is too much to pay for the deaths and injuries even a minimal increase in usage would prevent. This methodology raises the question of whether even the existing manual seat belt requirement could be cost justified.[34]

The $75 estimate aside, NHTSA assumed no reductions in auto insurance premiums due to fewer injuries. According to NHTSA, "there does not appear to be any certainty" that owners would receive discounts. Pet. App. 106a. This not only reverses the burden of "certainty" to meet the agency's preordained conclusions, it defies the record which reflects the fact that insurance premiums (which are generally subject to state regulation) tend over time to be a function of insurance costs. As car safety increases, costs go down and so do premiums. This is shown in an analysis done by NHTSA estimating savings in insurance premiums related to increased use of passive restraints. Discounted to present value,[35] it showed savings of $79 per vehicle if a 22% usage rate for passive restraints was achieved, C.A. App. 162; *i.e.*, enough to *eliminate entirely* the added retail cost.

The cost to society of motor vehicle accidents was prominently mentioned in the legislative history as a reason for

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[34] NHTSA estimated that the incremental retail cost of a manual belt was $50-75 per car, C.A. App. 202, nearly as much as the incremental retail cost of an automatic belt. C.A. App. 210. If automatic belts were not cost justified even if they produced an incremental increase in usage rates of 11%, C.A. App. 284, it seems doubtful that manual belts, which currently produce an overall usage rate of approximately 11%, could be found cost-effective.

[35] Long term costs were used since actuarially-based premium reductions require experience and hence lag behind safety costs. C.A. App. 149-50. However, many auto insurers have tried to encourage passive restraints by offering judgmental discounts to purchasers of cars with passive restraints and as of March, 1981, six of the twelve largest automobile insurers offered such discounts. C.A. App. 1353.

enactment of the Safety Act. *See, e.g.*, 112 Cong. Rec. 19647 (Rep. Ryan). While this does not necessarily require NHTSA to focus on societal cost in every decision, it is impossible to understand how the agency could have been certain that it was not worth $75 a car to save, at a minimum, 1,000 lives and 20,000 injuries annually when its own estimates of societal cost savings showed them to be substantial.

NHTSA made such estimates in a portion of its Regulatory Impact Analysis directed to rebutting another cost/benefit projection. In its calculations, NHTSA estimated the present value to society for each life saved at $314,000 to $448,000, and for each serious injury avoided at $15,140 to $18,110, depending on the discount rate used. C.A. App. 278. Using those assumptions, the avoidance of 1,000 deaths and 20,000 serious injuries, (a 5.6 percentage point increase in usage rates), would produce societal benefits of $616 to $810 million. Similarly, a 10 percentage point increase would produce societal benefits of $1.11 to $1.46 billion. Thus, even accepting NHTSA's minimal usage rate estimates and assumed costs, the benefits were significant in relation to the added costs. Given this, and the Safety Act's bias toward safety, NHTSA had no discretion to rescind on the basis of a comparison of costs and benefits.

3. *It erroneously relied on the risk of adverse public reaction.* NHTSA described the possibility of adverse public reaction as the "principal risk" of nonrescission, Pet App. 114a, and went on to describe that risk as follows:

> If the detachable automatic belts do not produce more than negligible safety benefits, then regardless of the benefits attributable to the small number of other types of automatic restraints planned to be installed, the public may resent being required to pay substantially more for the automatic systems. Many if not most consumers could well conclude that the automatic belts would in fact provide them with no different freedom of choice about usage or levels of protection than manual belts currently offer. As a result, it is not unreasonable to conclude that the

> public may regard the automatic restraint requirements as an expensive example of ineffective regulation.

Pet. App. 107a-108a.

Later in its discussion, NHTSA also spoke of the automatic seat belt perjoratively as a means of converting the Safety Act into a "people forcing" statute, one which "force[s] people to accept protection that they do not choose for themselves." Pet. App. 116a. There are two principal problems with NHTSA's analysis, and each underscores the basic nonrationality of Notice 25.

1. The logic was the reverse of that used to analyze usage rates. The reason NHTSA found that usage rates would not increase significantly is because detachable belts could be detached permanently and therefore would *not* be "people forcing." Early in Notice 25, NHTSA described detachable automatic belts as restraints which "manufacturers have designed . . . to avoid creating a significant adverse reaction." Pet. App. 92a. The discussion of public attitudes proceeded on the exact opposite assumption and ignored the evidence that a substantial segment of the population would in fact choose automatic protection for themselves if it were given the opportunity.

2. It misconceived the agency's role. Public attitude is a relevant consideration only where it may affect usage of the safety device. *See, e.g., Pacific Legal Foundation v. Department of Transportation,* 593 F.2d at 1345-46. This is different from an implied public referendum concerning the expense of motor vehicle safety regulation. Congress has decided to regulate motor vehicle safety and has provided for consideration of the cost of such regulation. In doing so, Congress presumably has taken into account public reaction to the cost of regulation. If Congress finds it has misjudged public reaction and wants to change the law, it knows how to do so, as illustrated by the amendments to the Safety Act provoked by the ignition interlock.

Congress clearly did not delegate to the agency the right to make independent judgments about the public popularity of the statutory scheme and to refuse to act on that account. It did not grant the agency the right to veto the Congressional purpose because of the agency's different idea about what the public would like.

C. NHTSA Failed To Analyze Rationally The Consequences Of Rescission, Although The Most Probable Consequence Was The Termination Of Technology Required By The Safety Act.

Almost all of Notice 25 was devoted to an analysis of the consequences of retaining a passive restraint requirement. As discussed above, the errors in that analysis are sufficient to establish the unlawfulness of the agency action. But it was equally unlawful because of NHTSA's failure to weigh the consequences of *rescinding* the passive restraint requirement. In the face of a technology *forcing* mandate NHTSA took a technology *terminating* action, and it did so without rational discussion of the relevant factors.

Eliminating Standard 208 involved far more than eliminating detachable automatic belts. Standard 208 could be satisfied with other technologies even more effective in meeting the need for motor vehicle safelty. These include automatic belts which have emergency releases but which are not totally detachable, *e.g.*, the design that generated a 70% usage rate in 1980 Chevettes. Pet. App. 19a n.12. Other belt designs, such as that on the VW Rabbit, have shown an ability to generate usage by virtue of a convenient and comfortable design. And, of course, air bags, the state-of-the-art technology, are effective and completely unobtrusive.

NHTSA did not, and could not, find that all of these more effective technologies would be abandoned by manufacturers if the passive restraint requirement were maintained. It found only that, "[a]lthough some aspects of the car manufacturers' automatic belt plans are still tentative, it now appears reasonably certain that if the automatic restraint requirements were implemented, the overwhelming majority of new cars would be equipped with automatic belts that are detachable. . . ." Pet.

App. 97a. Even if this finding is accepted as reasonable,[36] it nevertheless does not answer the question of what mix of passive restraints would be offered *in the long run* if a variety of passive restraints were available to the public initially. Would the manufacturers stick to these plans or would more effective technologies tend to assume a greater role? NHTSA apparently assumed, without discussion, that the passive restraints actually offered to the public over the long run would conform to these initial and "tentative" plans. In so doing, it closed its eyes to the fact that many commonplace design and engineering features on cars today are the result of a competitive response, rather than the initial plans, of a leading manufacturer. Two factors—competition and product liability—suggest that long run, "real world" offerings of passive restraints would probably be different from initial compliance plans.

As to competition, the Safety Act calls for performance rather than design standards because of a Congressional "faith" that such standards, once in effect, would induce "a vigorous and competitive effort to improve the safety of vehicles." Senate Report at 1, 6. The essence of this idea, however, is that before the marketplace will begin to produce better safety, *the standard must be in effect.*[37] There was strong evidence that the "faith" Congress placed in the marketplace was not misplaced,[38] and if NHTSA entertained doubts they were nowhere expressed in Notice 25.

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[36] Although the court of appeals deferred to this finding, it noted that it might nevertheless be erroneous. Pet. App. 50a, n.27.

[37] In economic terms, a passive restraint requirement is necessary because of a "real market failure situation." Arnould & Grabowski, *Auto Safety Regulation: An Analysis of Market Failure*, 12 Bell Journal of Economics, 27, 46 (Spring, 1981) C.A. App. 714, 733. The fact that this is precisely what happened prior to 1966 is one of the reasons Congress passed the Safety Act, *infra* p. 13; and considering the rapid destruction of passive restraint programs after Notice 25 was issued, *infra* p. 7, it is likely to happen again absent a requirement.

[38] There is substantial evidence in the record, including the attitude evidence noted *infra* at 20-22 and eleven major public opinion polls

(footnote continues)

As to product liability, the so-called "Larsen rule" holds that "[i]f an article can be made safer and the hazard of harm may be mitigated 'by an alternate design or device at no substantial increase in price,' then the manufacturer has a duty to adopt such a design. . . ." *Dreisonstock v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1073 (4th Cir. 1974).[39] The impact of these legal constraints on long run production went unexamined by NHTSA.

The record gives every reason to believe that, assuming a passive restraint requirement, the more effective automatic crash protection technology would eventually prevail in the marketplace; and absent such a requirement, all of such technology would be sacrificed. (This would be incorrect only to the extent that detachable automatic belts themselves proved to be highly effective.) Under the Safety Act, NHTSA was obliged to look beyond the manufacturers' initial plans before terminating Standard 208. Since a basic purpose of the Safety Act is its emphasis on the introduction of new safety technology, an agency which takes a step so plainly contrary to the statutory purpose must provide some indication that all relevant

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(footnote continued)

conducted since 1971 (many at the behest of the manufacturers), that consumers have a preference for more safety and, specifically, for automatic crash protection devices. C.A. App. 457-60. Similarly, there is no economic incentive for offering a degraded automatic crash protection device. In fact, the Regulatory Impact Analysis noted that GM's detachable belt installed on 1981 Cadillacs was "*more expensive* than the automatic system that was offered on its Chevette subcompact." C.A. App. 198 (emphasis added).

[39] This rule is followed in most jurisdictions. *See also Seese v. Volkswagenwerk, A.G.*, 648 F.2d 833, 840-41 (3rd Cir.) *cert. denied*, 454 U.S. 867 (1981); *Huff v. White Motor Corp.*, 565 F.2d 104, 110-11 (7th Cir. 1977); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). As noted in *Seese*, "[t]he history of automobile products liability law has been one which has taken into account the urgent need to provide incentives to manufacturers to take those steps necessary to minimize potential harm-causing defects." 648 F.2d at 840. Section 108(c) of the Safety Act, 15 U.S.C. § 1397(c) (1976), is intended in part to preserve state common law theories of product liability and compliance with a safety standard is not a defense to liability. *See, Dorsey v. Honda Motor Co.*, 655 F.2d 650, 656-57 (5th Cir. 1981), *modified*, 670 F.2d 21, *order & reh'g denied*, 673 F.2d 911, *cert. denied* 103 S.Ct. 177 (1982).

factors have been considered. The effect of the marketplace on future improvements in safety was such a factor.

NHTSA's limited discussion of nondetachable belts and air bags certainly did not satisfy its burden of explanation. Three paragraphs in Notice 25 were devoted to a discussion of use-compelling belt designs, Pet. App. 109a-110a, but that discussion was totally misdirected. *See infra* p. 39. The possibility that, if the standard were retained, market forces might cause manufacturers to offer more appealing and effective belt designs was not mentioned. NHTSA's only discussion of the effect of rescission on air bag technology was the observation that the manufacturers' explanation that "they chose belt systems [rather than air bags] for compliance because of the competitive disadvantage of offering the relatively expensive, inadequately understood air bag . . . seems credible." Pet. App. 96a-97a. With that passing observation, NHTSA wrote an end to what was once called the "air bag standard."[40]

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[40] The abandonment of air bag technology is particularly significant since several manufacturers, including Mercedes-Benz, Volvo, and GM, had at least publicly discussed air bag production plans in recent years. *See infra* p. 7. The Regulatory Impact Analysis assumed model year 1984 sales of 50,000 air bag equipped vehicles, C.A. App. 144, if passive restraints were required, fewer than the 500,000 vehicles contemplated over a two year period for the Coleman Plan (although it would take less than 3% of projected production in model years 1984 and 1985 to reach that level, C.A. App. 41), but substantially more than the 5,000 vehicles in NHTSA's current GSA demonstration project. DOT brief, at 12, n.12. In other words, if the passive restraint requirement had not been rescinded there would at the very least be the equivalent of a substantial air bag "demonstration" in the marketplace. NHTSA, however, gave no consideration to whether competitive factors might then require manufacturers to offer such an option on their top-of-the-line cars. Nor did it ask itself whether such a "demonstration" might lead to the spread of air bags to lower priced cars—a path followed by many other automobile engineering and design innovations. Whatever the answer to these questions, NHTSA was required to at least ask them before discarding air bags with other means of compliance.

D. NHTSA Did Not Give Rational Consideration To The Numerous Alternatives Less Drastic Than Rescission.

The question of NHTSA's obligation to consider alternatives less drastic than rescinding the entire passive restraint requirement need not be reached if, as shown above, NHTSA's conclusions about detachable belts were arbitrary and capricious. If, however, those conclusions were valid, the agency still had an obligation under the Safety Act to preserve potentially effective safety technology. Throwing out the entire requirement because of an alleged design loophole selected by the manufacturers arguably may have been necessary,[41] but the agency had an obligation to address this question at least with enough precision to assure a reviewing court that there has been a "rational connection between the facts found and the choice made." *See Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974), *quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). This obligation does not carry with it the duty to examine every theoretical alternative to total rescission.[42] On the other hand, it does envision some consideration of *practical* alternatives.[43]

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[41] The court of appeals correctly observed that "[i]t is almost embarrassingly obvious that technology that does *not* meet the performance standard may *not* be used." Pet. App. 58a. The point of the discussion in the text above is that even if this is incorrect, *i.e.*, even if NHTSA had successfully created a loophole that wiped out all effective passive restraint technology, NHTSA could and *should* have given consideration to closing that loophole before it began to consider rescission.

[42] *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551, 553-54 (1978).

[43] The fact that NHTSA did at least attempt to consider alternatives in Notice 25 disposes of the *post hoc* arguments of petitioners that NHTSA was procedurally foreclosed from any effort to "fix" the passive restraint requirement. The history of the passive restraint requirement in general, and the "emergency escape" provision in particular, has been one of continuous regulatory "fixes" as required. Similarly, the court of appeals was hardly foreclosed from pointing this out by the teaching of *Vermont Yankee*, a decision that did proscribe procedural interference by a reviewing court but that did *not* hold that procedural discretion can be used to shield arbitrary and capricious action. *See Vermont Yankee*, 435 U.S. at 549 (remanding case to court of appeals for consideration of substantive lawfulness of agency decision).

NHTSA purported to consider alternatives but that consideration was arbitrary and capricious because it looked only at the theoretical alternatives and ignored on-the-shelf technology.

The discussion in Notice 25 of the alternatives to rescission encompassed three paragraphs in a section entitled "Option of Adopting Use-Compelling Features." Pet. App. 109a. NHTSA rejected this "option" on the basis of its discussion of ignition interlocks and belts which do not release to allow accident victims to be extricated. Both, however, were artificial alternatives, not seriously advocated by anyone as a way to induce higher usage. At no point did NHTSA discuss the fact that every automatic belt system it was presented with—and it had a least seven such systems before it at the time of rescission, C.A. App. 37—contained the "emergency release" mechanism required by Standard 208, yet *only* the GM-type belt was fully detachable. The 1980 Chevette system, for example, employed an emergency release mechanism that detached the lap portion while maintaining the continuous shoulder portion, yet it achieved a very high usage rate. GM also proposed another "spool-out" mechanism that met NHTSA's concerns. Pet. App. 110a. Finally, as GM had demonstrated, even a detachable belt produced very high usage rates when combined with both a warning light and an audible warning. *See infra* p. 26.

NHTSA had an obligation to consider genuine options rather than red herrings.[44] As shown, genuine options were available. NHTSA's failure to examine these practical but less drastic alternatives to total rescission was compounded by the "alternative methods of increasing restraint usage" it did adopt—an educational campaign. Pet. App. 110a. As noted previously, this is exactly the opposite of the statutory purpose, which is *not to accept* voluntary programs in lieu of mandatory

[44] The remaining reason give by NHTSA for not prescribing use-compelling alternatives was a fear that Congress "would look with some disfavor" upon it. Pet. App. 109a-10a. This conclusion, however, rests on the two alternatives NHTSA discussed, not the ones it did not discuss. In any event, NHTSA's job is to respond to the statute, not to its predictions of what may find favor with the current Congress.

standards.[45] On the other hand, the possibility of using an educational campaign to enhance the effectiveness of an automatic restraint requirement was not seriously or rationally considered.

III. PETITIONERS' ARGUMENTS FOCUS SOLELY ON THE OPINION OF THE COURT OF APPEALS, NOT ON THE LAWFULNESS OF THE AGENCY ACTION, AND THEY ARE COMPLETELY WITHOUT MERIT.

The ultimate issue in this case is the lawfulness of NHTSA's rescission of the automatic crash protection requirement.[46] Nevertheless, most of the pages in the petitioners' briefs are devoted to a relatively small number of pages in the court of appeals opinion, almost as if the debate over automatic crash protection first began on June 1, 1982 with the release of that opinion. These excerpts, largely taken out of context, are then compared with dicta from a variety of other sources, leading petitioners to conclude that the court of appeals adopted some radically new standard of review and committed other errors. Their criticism is without basis in fact or in law.

A. The Court Of Appeals Did Not Adopt A New Standard Of Review.

The central contention of the petitioners is that the court of appeals adopted a standard that bars an agency from rescinding a regulation if changed circumstances have led to "substantial uncertainty" about the regulation's continued value. That was *not* the holding of the court of appeals, either explicitly or implicitly. The court of appeals carefully followed the "arbitrary and capricious" standard of review as articulated

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[45] Apart from the fact that NHTSA was going to undertake this campaign in any event, C.A. App. 1218-19, it is painfully clear from the record that educational campaigns do not produce long term increases in belt usage. C.A. App. 313-14, 454, 520, 543-544, 672 and 732. NHTSA's current program of having celebrities urge people to "buckle up" is in the tradition of past failures.

[46] *Cf. Brown v. Allen*, 344 U.S. 443, 459 (1953); *B.F. Goodrich Co. v. U.S.*, 321 U.S. 126, 127 (1944); *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

by the Court in *Overton Park* and thereafter. Pet. App. 48a-49a.[47]

The petitioners have attempted to create a dispute where none exists by: (1) confusing the context in which the Section 10(e) standard of review has been applied with the standard itself; and (2) erroneously characterizing certain portions of the court of appeals opinion. Each is discussed below.

1. Petitioners seem to recognize that the arbitrary and capricious test is not a rigid scientific measurement, that it draws its meaning almost entirely from the context of each case. That, indeed, was the major point of the "refusal to promulgate" cases cited by the court of appeals and now urged by petitioners.[48] Petitioners also seem to recognize that the principal elements of that context are the statute and the record. Whether or not "substantial uncertainty" about the future, without more, might be an appropriate basis for agency action in another situation, the court of appeals found it was inappropriate in *this* case, given *this* statute and *this* record.

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[47] Although the standard is both narrow and deferential, the court still must make a "searching and careful" inquiry into the facts to determine if there is a "rational connection between the facts found and the choice made." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. at 285-86. The elaborate historical analysis of Section 10(e) in the DOT Brief, at 23-29, is not to the contrary. The point of that analysis, the overdrawn analogies aside, is that the standard of review is deferential, but, as the Court has repeatedly noted, it is not deferential to the point where even the most irrational of excuses proferred by an agency must be accepted at face value. The standard of review may well be deferential, indeed any standard other than de novo review necessarily entails a degree of deference, but it is deference that is applied *after* the statutory mandate and the facts are examined. To do otherwise, of course, would be to effectively make agency actions immune from judicial review.

[48] *WWHT, Inc. v. Federal Communications Commission*, 656 F.2d 807, 817 (D.C. Cir. 1981) ("the parameters of the 'arbitrary and capricious' standard of review will vary with the context of the case"); *Natural Resources Defense Council, Inc. v. Securities and Exchange Commission*, 606 F.2d 1031, 1050 (D.C. Cir. 1979) ("the concept of 'arbitrary and capricious' review defies generalized application and demands, instead, close attention to the nature of the particular problem faced by the agency").

This statute, as discussed above, is not typical of regulatory statutes. It emphasizes duty as well as discretion and means —such as advancing new technology—as well as ends. NHTSA's mandate is to reduce deaths and injuries by issuing mandatory safety standards, not to decide whether that policy should be preferred over another. NHTSA is not administering the "supple instrument" of a public interest mandate in an economic regulatory statute, the situation presented in the cases relied upon the petitioners.[49]

This record was equally unique. It was dominated by the agency's complete reversal of direction from a course it had followed for over a decade. As the petitioners acknowledge, the court could not ignore the fact that there had been a departure from a "settled course." *See Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800, 807-08 (1973); DOT Brief at 34; MVMA Brief at 26. When there is such a reversal of direction, there is always a greater burden of explanation, but it is a burden created by the agency action, not by the court. Thus, statements of the court of appeals referring to the absence of evidence supporting the agency's conclusions do not establish a different standard of review. They are made

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[49] *See Federal Communications Comm'n v. WNCN Listeners Guild*, 450 U.S. 582, 593-95 (1981). *See also Federal Communications Comm'n v. National Citizens Committee For Broadcasting*, 436 U.S. 775, 780 (1978); *United States v. Midwest Video Corp.*, 406 U.S. 649, 671-75 (1972) (all involving the "public interest, convenience and necessity" standard of the Communications Act of 1934, 47 U.S.C. §303 (1976)); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968) (involving the "unjust, unreasonable, unduly discriminatory or preferential" standard of the Natural Gas Act, 15 U.S.C. §717c (1976)); *American Trucking Ass'ns, Inc. v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 406-07 (1967) (involving the "just and reasonable" standard of the Interstate Commerce Act, 49 U.S.C. §1(3)-(5)).

Petitioners seem to rely on the fact that the statute contains a power to revoke standards as somehow indicating that the Congress was indifferent to whether the agency promulgated standards or not. The power to revoke, however, must be read in the context of the statutory purpose, and in aid of that purpose rather than in derogation of it. Petitioners' concept of a neutral statute is also at odds with 15 U.S.C. §1410a which requires the Secretary to act within 120 days upon petition of any person to either begin proceedings toward adoption of a standard or, if he denies the petition, to publish his reasons in the Federal Register.

in the *context* of that reversal, and in the *context* of a statute which also points in the opposite direction. Given that context, the court of appeals would have been remiss in its duty if it had accepted naked proclamations of uncertainty, no matter how often made. Naked uncertainty might well suffice for rescission of a regulation or a refusal to promulgate where there is "public interest" discretion, where there has been no reversal of direction or where there is a minimal record, but that is not *this* case.

The question before the court of appeals here was whether, acknowledging the deference due the agency, there were facts and circumstances which rationally explained its reversal of course and its apparent departure from the statutory purpose. This was the central issue, but it is one to which petitioners give precious little attention. The Federal Parties declare boldly that NHTSA engaged in a "thorough and reasoned assessment." DOT Brief at 29. But did it? This central question is scarcely addressed by petitioners except in such conclusory terms. The court of appeals had to address it. When it did, it came to the only conclusion possible.

2. One page of the court of appeals opinion (Pet. App. 51a) is cited by the petitioners probably more times than they cite to the record. *See, e.g.*, DOT Brief at 19, 29, 30 and 32; MVMA Brief at 19, 20 and 22. The court of appeals made two observations at that page: first, it said "[t]here may well be 'substantial uncertainty' about the seat belt usage rates that can be predicted if detachable belts are widely used;" and later in that same paragraph it went on to say that "it would be unreasonable for an agency to promulgate a regulation simply because of 'substantial uncertainty' that the status quo was any better." Pet. App. 51a. Juxtaposing these two observations, the petitioners contend that: (1) the court of appeals recognized that NHTSA's uncertainty was "reasonable"; and (2) the court of appeals recognized that the specific degree of uncertainty possessed by NHTSA at the time of rescission would have been an adequate basis for it to refuse to promulgate the requirement in the first instance.

These are completely erroneous characterizations of the opinion. At no point did the court of appeals state or even

imply that NHTSA's uncertainty was reasonable in the context of this case. The only "uncertainty" was the specific level of usage that could be achieved with detachable belts, but, as the court found, there was no rational reason to believe, given the record, that they "cannot lead to safety benefits that exceed their relatively small marginal costs." Pet. App. 51a-52a. Similarly, the court of appeals neither stated nor implied that given *this* statute and *this* record, NHTSA would have had an adequate basis for not issuing the passive restraint requirement in the first instance. In short, the term "substantial uncertainty" is a generalization. It cannot be lifted out of context solely to accomodate hypothetical, indeed unimaginable, fact situations.[50]

B. The Court Of Appeals Did Not Place Undue Or Erroneous Reliance On Post-Enactment Legislative Events.

The court of appeals opinion contains a detailed analysis of the lengthy and complex post-enactment legislative history of

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[50] Other characterizations by Petitioners are less relevant but equally erroneous:

a. The Federal Parties describe NHTSA's action as simply the withdrawal of a "burdensome" rule that "has not yet gone into effect," DOT Brief, at 33, a neutral, housekeeping action that got rid of some vague proposal for the future. The description of automatic crash protection as "burdensome" begs the obvious question of who would be burdened by a life-saving regulation, but the "not yet gone into effect" characterization is also inaccurate. Apart from its history in the early and mid-1970's, the automatic crash protection requirement was in effect from January 5, 1977 through its rescission effective December 8, 1981. Because of the manufacturers' insistence on long lead time requirements, the actual compliance dates were never reached, but the effectiveness of the regulation and the imminence of the compliance dates still led to the development, testing and actual production of several effective automatic crash protection technologies. By rescinding the requirement, NHTSA abandoned those technologies.

b. Similarly, the Federal Parties suggest that the court of appeals reversed a "presumption against regulation" implicit in the Safety Act. DOT Brief, at 31, n.26. The legislative history of the Safety Act suggests a contrary interpretation. Moreover, to the extent that an evidentiary presumption is involved, Section 7 of the Administrative Procedure Act, 5 U.S.C. § 556(d) (1976), logically places the burden on NHTSA (and the manufacturers) as the proponents of the rescission, much as they would carry the burden for initial promulgation. *See Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 653 (1980).

the Safety Act as it relates to passive restraints. Pet. App. 32a-46a. While the court of appeals could hardly have chosen to ignore that history, it must be emphasized that the pre-enactment history and the plain meaning of the Safety Act define the limits of the discretion available to NHTSA. Nevertheless, the petitioners have seized upon the court of appeals analysis as being inappropriate in the first instance and erroneous in its conclusion. Neither criticism is well taken.

1. The court of appeals did not divine any mandate from the post-enactment history that otherwise would not exist. It did find that "a consistent administrative interpretation shown clearly to have been brought to the attention of Congress and not changed by it," while not barring rescission for rational reasons essentially confirmed the statute's "language of command." Pet. App. 47a, citing *Udall v. Tallman*, 380 U.S. 1, 17-18, *reh'g denied*, 380 U.S. 989 (1965) and *Kay v. Federal Communications Commission*, 443 F.2d 638, 646-47 (D.C. Cir. 1970). The deference owed an agency's prior construction of a statute "is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception. . . ." *United States v Rutherford*, 442 U.S. 544, 554 & n.10 (1979).

2. Petitioners also contend that the court of appeals incorrectly analyzed the post-enactment history, that NHTSA always viewed the passive restraint requirement as a discretionary act and that Congress did not disagree. In other words, they have declared the post-enactment history to be a victory for the forces opposed to automatic crash protection. That it was not so is clear from the analysis in the opinion.[51]

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[51] Petitioners' descriptions of what transpired in the 1969-1976 period require some clarification:

a. From the very beginning, NHTSA recognized that "the interests of motor vehicle safety *demand* the prompt development and installation of passive restraint systems," 34 Fed. Reg. 11148 (July 2, 1969) (emphasis added), C.A. App. 2503, and that "[p]assive protection has become *imperative*. . . ." 35 Fed. Reg. 16927 (Nov. 3, 1970) (emphasis added), C.A. App. 2498. The reversal of the first automatic crash protection requirement on technical grounds in *Chrysler Corporation* put the requirement back a number

(footnote continues)

C. The Stay Entered By The Court Of Appeals On Behalf Of Petitioners Did Not Raise Any Justiciable Issues.

Petitioners contend that the court of appeals violated the dictates of *Vermont Yankee* by "ordering" a new compliance date of September 1, 1983, and by asking for evidence as to the propriety of a different date. A review of what the court of appeals actually did and did not do quickly disposes of this argument.

If the mandate of the court of appeals had issued shortly after its opinion, and assuming that mandate was not subsequently stayed or withdrawn, 1983 model year large and medium-size automobiles presently on sale would be required to have passive restraints, and all 1984 model year automobiles would have been required to have such devices. The court of appeals used its inherent equitable powers solely to stay the compliance dates *for the ostensible benefit of the petitioners.* This is a scenario not only devoid of procedural interference by the court of appeals, it is devoid of any injury to the complaining parties.

All of the above aside, the fact is that with the court of appeals' *sua sponte* withdrawal of its mandate, there are no currently effective compliance dates. In other words, the petitioners' procedural argument is not only misplaced, it is moot.

(footnote continued)

of years, but nothing in the 1969-76 period suggests a change in direction by either NHTSA or by Congress. Pet. App. 33a-36a. Even when NHTSA completed the regulatory actions triggered by the *Chrysler* decision by "revoking and reserving" the passive restraint requirement, it emphasized that it intended "to propose the long-term requirements for occupant crash protection, both for passenger cars and for light trucks and MPV's, as soon as possible." 40 Fed. Reg. 33977 (Aug. 13, 1975).

b. The notion that Secretary Coleman proposed a demonstration project in 1976 as an alternative to mandatory passive restraints is misplaced. He was "convinced, after a painstaking examination of the record, that passive restraints are technologically feasible, would provide substantially increased protection to the public in traffic accidents, and can be produced economically." C.A. App. 2073. Rather than readopting a standard that would be phased in over a number of years, he chose to *require* the industry, by contract, to provide passive restraints in 500,000 vehicles in the following model years. C.A. App. 2075. In other words, he chose a different and quite unique implementation strategy, but the direction remained unchanged.

CONCLUSION

The holding of the court of appeals should be affirmed.

Respectfully submitted,

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